

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 657 of 1997****For Approval and Signature:****HONOURABLE MR.JUSTICE AKIL KURESHI**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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BALAJI SADAJI THAKOR - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

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Appearance :

MR SHAKEEL A QURESHI for Appellant(s) : 1,

MR PD BHATTE, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**Date : 18/12/2007****ORAL JUDGMENT**

1.The appeal arises out of a judgement and order
dated 30.6.1997 passed by learned Additional
Sessions Judge, Mehsana in Sessions Case

No.43/1997.

2. The appellant was the original accused charged with offence punishable under Section 302 of the Indian Penal Code. He was however, convicted under Section 304 Part-II of the Indian Penal Code. He was sentenced to undergo two years of rigorous imprisonment and pay a fine of Rs.500/-. The accused is therefore, in appeal against the said judgement.
3. The prosecution case was that on 8.7.1996 at about 5 0' Clock in the evening accused had picked up a fight with one Kanubhai Vaghri when he was passing near the house of the accused along with his wife. The accused attacked deceased Kanubhai and gave several kicks in his stomach which caused internal injuries ultimately leading to his death. It was therefore, alleged that the accused had committed offence punishable under Section 302 of the Indian Penal Code.
4. To prove the charge, the prosecution examined Krishnaben Kanubhai-PW3, wife of the deceased at exh.28. She stated that her husband Kanubhai had left home at about 10 0' clock in the morning. Till 4 0' clock in the afternoon since he did not return, she went to the village looking for him. She reached at the crematorium near village Magpara. There she found that under a tree, her

husband was sleeping. She also saw one another person belonging to Vaghri community sleeping next to her husband. Babu Kanti and Sampat Vaghri were also sleeping there. She awoke her husband and was taking him home. When they were passing by the house of the accused, her husband requested for lending him a sum of Rs.50/-. The accused refused to lend money and started abusing her husband. When her husband asked him not to use foul language, accused lifted him and threw him on the ground and started giving fist and kick blows on his stomach. He was wearing shoes. He was kicking her husband with shoes. She therefore, started shouting. All the four who were sleeping nearby came to the spot upon which the accused ran away. She identified the accused in the Court. She left her husband at the spot and called her mother-in-law. Both of them put the injured person in the Rickshaw and brought near their house in the Rickshaw. Her husband had to be carried to some distance, since he could not walk. He complained of extreme pain in stomach and requested that he be taken to the hospital. She could not take him to the hospital since she did not have money. Next day in the morning at about 10 0' Clock, after borrowing money, she went to Civil Hospital, Mehsana. At about 11 0' Clock when the Doctor examined the patient, he found that her husband had already died. She thereupon gave her complaint to the police.

4.1 In the cross examination, she was confronted with some of the improvements compared to the statement before the police. However, insofar as nature of incident is concerned, nothing substantial has been brought out in the cross examination. Though it was suggested that her husband was in habit of consuming liquor and it was possible that he may have fallen down under drunken condition and thereby received injuries, this suggestion was denied by the witness.

5. Ramu alias Chui Keshabhai-PW4 was examined at exh.30. He was sleeping under the tree next to the deceased when the complainant went to fetch him. Though he has been declared as hostile, his testimony is significant in certain aspects and need not be totally discarded.

5.1 He stated that on the date of incident, he, Sampat Mohan, Bhaiji Vasu and Kanti Babu as well as the deceased were sleeping under the tree. At a short distance from the tree, house of the accused is located. Deceased was beaten by accused upon which wife of deceased started shouting. They therefore, got up from sleeping and rushed to the spot at which time the assailant had ran away.

5.2 As noted, from this point onwards

though the witness did not support the prosecution, the initial testimony corroborates the eyewitness account of the complainant.

6. Dr. Bhagwandas Dahyalal Modi-PW2 was examined at exh.24. He had carried out the postmortem of the body of the deceased. He found following injuries on the body of the deceased:

1) Upon cutting up of the stomach, in the cavity he found two litres of blood deposited.

2) There was cut mark on the intestine of 3cm x 1cm which had reached upto the cavity in which blood clotting was noticed.

6.1 He stated that death of deceased was on account of excessive bleeding. He agreed that if a person is kicked with force and if a person kicking is wearing shoes, it is possible that such assault can cause internal injuries without causing external injuries and it can cause damage to the veins leading to bleeding and ultimate death.

6.2 In the cross examination, he agreed that he had not treated the deceased when he was alive. He stated that if the patient was treated timely, it was possible that he might have been saved. He denied that there were ulcer in the stomach of deceased on account of excessive

liquor consumption. He however, agreed that if a person under drunken condition falls down and hits the ground hard, same could lead to similar injuries and internal bleeding.

7. With the permission of the Court, prosecution dropped rest of the witnesses and focused on the evidence of the above witnesses examined before the Court.

8. From the evidence on record, it can be seen straightway that there were eyewitness account giving version of deceased being assaulted by the accused. The complainant Krishnaben-PW3 in her deposition at exh.28 clearly stated that on the date of incident she had gone to look for her husband who had left the home at 10 0' clock in the morning and did not return till 4 0' Clock in the evening. She found that her husband was sleeping under the tree along with several other persons including Ramu-PW4. She woke her husband and escorted him back to home. When they reached near the house of the accused, they had a quarrel with him. The accused first pushed him on the ground and then started giving him kick and fist blows in the stomach. She brought the husband back home in Rickshaw. After calling her mother-in-law, deceased complained of severe pain in stomach. She however, could not take him to hospital at night because she did not have money. After borrowing money in the morning, she

took him to hospital where he was declared brought dead. This aspect of the incident was corroborated by the evidence of Ramu-PW4 who though initially supported the prosecution till the stage of accused having assaulted the deceased, turned hostile. The testimony of the complainant-PW3 is well supported by eyewitness account Ramu-PW4 as well as by Doctor's evidence. Dr. Bhagwandas-PW2 had carried out the postmortem of deceased. He found internal injuries on the stomach. He opined that death was on account of excessive bleeding. This corroborates with the version of the complainant that her husband was given kick blows in the stomach.

9.The fact that accused had assaulted deceased and given several kick blows with shoes therefore, remains fully established. It is also not in doubt that injuries caused internal hemorrhage and excessive blood loss leading to death of the deceased.

10.The question is what offence did the accused commit and what should be the appropriate sentence.

11.As noted, learned Additional Sessions Judge convicted the accused under Section 304 Part-II of the Indian Penal Code and sentenced him to undergo two years of rigorous imprisonment.

Section 304 Part-II makes punishable any act which is done with a knowledge that such act is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death. Considering the incident and the blows given by the accused to the deceased, it cannot be stated that the act was done with a knowledge that it is likely to cause death. His conviction under Section 304 Part-II of the Indian Penal Code therefore, was not justified. It can however, not be denied that the accused caused grievous hurt to the deceased. His conviction therefore, should have been appropriately one under Section 325 of the Indian Penal Code. Section 325 of the Indian Penal Code makes punishable the act of causing grievous hurt and prescribes a maximum punishment of seven years. Learned Additional Sessions Judge has awarded sentence of only two years. No further reduction is called for. It cannot be ignored that accused had given several kick and fist blows to the deceased on his stomach, the same caused internal hemorrhage and excessive bleeding and ultimate death of the deceased.

12. Under the circumstances, the conviction of the appellant under Section 304 Part-II of the Indian Penal Code though is set aside and is converted to one under Section 325 of the Indian Penal Code, sentence remains unaltered.

13.The appeal is disposed of accordingly. Bail stands cancelled. Time to surrender however, granted upto 9.2.1008.

(Akil Kureshi,J.)

(raghu)